

(ii) incremental costs of MnDOT construction within the Right of Way, such as:

(A) incremental cost to work around the Network (e.g., extra costs of moving construction equipment in and around the Right of Way resulting from Network occupancy of Right of Way);

(B) costs of delay caused by inability of Company to remove fiber optic cable, innerducts and conduit;

(C) construction claims arising out of delays caused by Company or by such inability of Company; and

(D) claims made against State by parties to User Agreements due to loss of revenue caused by interruption of service; and

(iii) costs of delays in MnDOT maintenance due to Company's failure to locate its Equipment, cable, conduit and innerducts, except that any notice period to which Company is entitled under this Agreement shall not constitute delay.

(c) As provided in Section 11.4(a), State shall confer and discuss with Company concerning charges to be made under subsection (b) above.

ARTICLE IX CONTRACTING AND EMPLOYMENT PRACTICES

Section 9.1 Key Contract Procurement; Key Contract Provisions; Key Contractor Qualifications.

(a) Within 90 Days after the Agreement Date, Company shall submit to State for their review and approval a plan (i) for allocating risk and responsibility among Key Contracts and (ii) providing payment and performance bonds or guarantees and insurance coverage. Such plan shall include the S&W Guaranty. State's approval of such plan shall not be arbitrarily withheld, conditioned or delayed and shall be based upon the scopes of work, needs, circumstances and scheduling requirements applicable to the Network. Different methodologies may be proposed for different Key Contracts. Company shall either incorporate into the plan any changes State requests in accordance with this subsection (a) or shall provide a written explanation to State of the reasons such changes should not be incorporated into the plan. State shall consider such explanation in making its determination whether to approve such plan. Company shall procure all Key Contracts in compliance with the approved plan. Except for the Key Contract between Company and S&W, no Key Contract shall be executed until such plan is approved.

(b) Prior to Commencement of Construction of Phase 1, Company and/or S&W shall enter into binding and enforceable Key Contracts at least for each of the categories of work and services described in subsections (a) and (b) of the definition of Key Contracts. The identity and qualifications of each contractor under each such Key Contract shall be subject to the prior written approval of State, which approval (i) shall be based only on financial responsibility, technical capability, experience and proper licensing and qualification in the State for the scope of work and liabilities involved and (ii) shall not be unreasonably delayed. A contractor shall be deemed approved if listed on a proposed bidder list submitted to and approved in writing by the State Project Manager. Each Key Contract also shall be subject to the prior review and approval of State, which State may withhold only if the Key Contract does not conform to the approved plan described in subsection (a) above or does not comply with subsection (c) below. The parties acknowledge that MnDOT and DOA have heretofore approved S&W as the contractor to provide engineering, procurement and construction services.

(c) Each Key Contract at a minimum shall conform to the plan approved in accordance with subsection (a) above and shall, unless waived in writing by State either specifically or by its approval of the Key Contract:

(i) set forth a standard of responsibility equal to or exceeding good commercial practice for work of similar scope and scale and shall set forth effective procedures for claims and change orders;

(ii) require the contractor to carry out its scope of work in accordance with the applicable provisions of this Agreement, the applicable approved Plans and Specifications, the applicable standards set forth in Section 5.1(a), the Schedule of Performance and any approved

changes thereto, subject to delay caused by Force Majeure to be defined and limited in a manner approved by State;

(iii) set forth warranties and guaranties of the contracting party against defects in design, construction, materials, manufacturing, equipment and workmanship, as applicable, in form and duration acceptable to State, equal to or exceeding good commercial practice for work of similar scope and scale;

(iv) in the case of the S&W Key Contract, include (A) design, engineering and construction of, and pricing for, the ITS and TMC improvements as described in Section 3.3(e) and (B) a requirement for direct payment from the Lender to S&W for services rendered upon approval by Company;

(v) in the case of the Key Contract for O,A&M, set forth (A) the contractor's obligation to pay liquidated damages if Performance Standards are not satisfied, according to a schedule consistent with that agreed upon between State and Company pursuant to Section 7.2(b), and (B) the contractor's warranty and guaranty of Network performance in accordance with the Performance Standards, as required under Section 7.2(c) and otherwise in form acceptable to State, which shall take effect not later than the first Cutover Date (unless State accepts such warranty and guaranty from another financially responsible third party pursuant to Section 7.2(c));

(vi) contain the most advantageous liability and indemnity provisions on the part of the contractor and the most advantageous remedies in favor of Company which Company is able to diligently negotiate;

(vii) provide for delivery, prior to Commencement of Construction of Phase 1, of payment and performance bonds or completion guarantees acceptable to State, if and to the extent required by the approved plan for Key Contracts set forth in subsection (a) above;

(viii) provide for delivery prior to Commencement of Construction of all insurance coverage required by, and in compliance with the applicable provisions of, Section 13.5, if and to the extent required from such contractor under the approved plan for Key Contracts set forth in subsection (a) above;

(ix) subject to the prior rights of Lenders pursuant to Article XVIII, be fully assignable to State, such assignability to include the benefit of all contractor representations, warranties, indemnities, guarantees, professional responsibility and other protections and include express requirements that, if State succeeds to Company's or S&W's rights under the subject contract (by assignment or otherwise), then the contractor agrees that it will (A) maintain appropriate books and records for the type of business in which it is engaged (e.g., constructor, Equipment supplier, designer), (B) permit audit thereof by State or its representatives, and provide progress reports to State appropriate for the type of contract it is performing to the same extent as required of Company or S&W under this Agreement and (C) allow State to assume the

benefit of Company's or S&W's contract rights and the work performed thereunder with liability only for those obligations accruing after the date of assignment and assumption;

(x) be assignable by the contractor only to another qualified, experienced and creditworthy contractor and only upon Company's and State's written approval;

(xi) be terminable by the contractor only for cause;

(xii) expressly require the contractor to participate in meetings between Company or S&W and authorized agents or field representatives of State, if and when requested by State, Company or S&W;

(xiii) expressly provide that all liens, claims and charges of the contractor and its subcontractors at any time shall not attach to any interest of State, MnDOT or DOA in Right of Way or in any other property;

(xiv) expressly include the requirements regarding prevailing wages, nondiscrimination, affirmative action hiring and disadvantaged business enterprises set forth in this Agreement;

(xv) require the contractor or subcontractor to issue certifications with each requisition for payment of the continued truth and accuracy of its representations and warranties, of the accuracy and completeness of all statements and computations set forth in the requisition for payment and of continued compliance with all the provisions of its contract or subcontract;

(xvi) expressly contain the contractor's or subcontractor's agreement and acknowledgment that State owes no duties, obligations or liabilities to the contractor or subcontractor and has not assumed the Key Contract, unless and until State assumes in writing the Key Contract;

(xvii) expressly state that the contractor's or subcontractor's employees are not considered employees of State for any reason including worker compensation claims or any other third party claims;

(xviii) be consistent in all other material respects with the terms and conditions of this Agreement to the extent such terms and conditions are applicable to the scope of work of such contractors or subcontractors; and

(xix) not be amended with respect to the foregoing matters or in any other material respect without the prior written consent of State.

(d) All contracts for design, construction, operations or maintenance, even though not Key Contracts, shall expressly provide that they are fully assignable to State, subject to the prior rights of Lenders pursuant to Article XVIII.

Section 9.2 User Agreements. Each User Agreement at a minimum shall:

- (a) subject to the prior rights of Lenders pursuant to Article XVIII, be fully assignable to any person or entity succeeding, voluntarily or involuntarily, to the interests of Company in the Network, including but not limited to State, without liability by such assignee for acts, omissions or circumstances occurring or arising prior to the effective date of assignment;
- (b) expressly provide that the user obtains no property interest or estate in or lien upon the Right of Way or the Network or any components thereof or any Intellectual Property, and that the User Agreement does not run with the Right of Way or the Network and is not binding upon any successor owner of the Network unless and until expressly assumed in writing by such successor owner;
- (c) expressly provide that it is subject and subordinate to this Agreement and State's rights and protections hereunder;
- (d) provide a term, including all options and rights to extend or renew, expiring not later than the stated expiration date of the Term of this Agreement;
- (e) expressly provide that all liens, claims and charges of the user at any time shall not attach to any interest of State, MnDOT or DOA in Right of Way or in any other property;
- (f) expressly contain the user's agreement and acknowledgment that State owes no duties, obligations or liabilities to the user and has not assumed the User Agreement, unless and until State assumes in writing the User Agreement;
- (g) not be assignable by Company except to any Lender or any successor owner of the Network;
- (h) prohibit entry onto the Right of Way by the user or its contractors except (i) where necessary to cure a material failure of Company to perform its obligations or (ii) in emergency circumstances, and in either case only in compliance with an access Permit issued by MnDOT and in compliance with the O,A&M Plan;
- (i) be consistent in all other material respects with the applicable terms and conditions of this Agreement, Permits, other Regulatory Approvals, the Utility Accommodation Policy and Laws and Regulations, including but not limited to any requirements and limitations regarding entry onto and access to Right of Way; and
- (j) not be amended with respect to the foregoing matters without the prior written consent of State and DOA.

Section 9.3 Obligation to Refrain from Discrimination.

(a) Each of Company and S&W covenants and agrees for itself, its successors and assigns that it shall not discriminate and it shall require all contractors not to discriminate against any person, or group of persons, on account of age, sex, sexual orientation, marital status, race, creed, color, national origin, religion, status with regard to public assistance or the presence of any sensory, mental or physical handicap in the permitting, design, construction, equipping, operation, administration, maintenance or management of the Network, nor shall Company or S&W establish or permit any such practice or practices of discrimination or segregation with reference to the selection, use, hiring, firing, promotion or termination of employees, contractors, subcontractors and vendors or with reference to the use, occupancy or enjoyment of or access to the Network; provided, however, that the prohibition against discrimination on the basis of sensory, mental or physical handicap shall not apply if the particular disability prevents the proper performance of the particular person involved.

(b) Company and S&W shall conduct their activities in connection with the Network in compliance with all other requirements imposed pursuant to the Minnesota Human Rights Act, Minnesota Statutes 363.01 et seq. (1996); Minnesota Equal Employment Opportunity (EEO) Special Provisions; Titles VI and VII of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973, as amended; Americans With Disabilities Act of 1990; and applicable rules and regulations including but not limited to Title 49, Code of Federal Regulations, Subtitle A, Office of the Secretary of Transportation, Part 1 (49 CFR Part 21), and as said Regulations may be amended.

Section 9.4 Disadvantaged Business Enterprise Utilization. Company and S&W shall comply with and are subject to the Good Faith Effort Requirement for Disadvantaged Business Enterprise ("DBE Provision") set forth in Exhibit D. The DBE Provision is based on the total design and construction cost for each Phase of the Network and does not apply to each type of contract. A DBE participation rate of 11% (Good Faith Efforts Option) is assigned to this Agreement.

Section 9.5 Affirmative Action and Equal Employment Opportunity.

(a) Company and S&W acknowledge and agree that it is the policy of State to promote and ensure economic advancement of minorities and women through employment. Company and S&W shall employ or select employees possessing the necessary skill, expertise, cost level and efficiency for the permitting, design, construction, equipping, operation, administration, maintenance and management of the Network.

(b) Company and S&W shall maintain at all relevant times Certificates of Compliance regarding affirmative action issued by the Minnesota Department of Human Rights.

(c) Company and S&W shall comply with and are subject to the Special Provisions for Equal Employment Opportunity (EEO) (the "EEO Special Provisions") set forth in Exhibit D

and the Implementation of Title VI Requirements set forth in Exhibit D. This Agreement shall be treated as a State funded contract in excess of \$50,000 for the purpose of determining applicable requirements of the EEO Special Provisions, except that the Economic Disadvantaged Employee Incentive program shall not apply to this Agreement. Company and S&W shall file with MnDOT's Office of EEO Contract Management within five Days after the Agreement Date a Notification of Specialty Project in the form included in Exhibit D.

(d) It is recommended that the EEO Officer designated by Company and S&W contact the MnDOT Office of EEO Contract Management to arrange training in implementation of Exhibit D. Such Office is willing to provide assistance and training upon request.

(e) Company and S&W shall incorporate the EEO Special Provisions in all Key Contracts for the permitting, design, construction, operation, administration, maintenance and management of the Network.

Section 9.6 Prevailing Wages. Company and S&W shall pay or cause to be paid to all workers employed in the State in connection with the construction, maintenance or repair of the Network not less than the prevailing rates of wages, as provided in the statutes applicable to State public work contracts, including without limitation Minn. Stat. §161.365 and Minn. Stat. §§177.41-177.44 and as attached hereto as Exhibit E. Company and S&W shall require that each contract or subcontract for the permitting, design, construction, operation, administration, maintenance and management of the Network conform to the requirements of such statutes.

Section 9.7 Professional Licensing. Company shall assure that all parties performing contracting work on the Network shall be licensed in accordance with all applicable Laws and Regulations; and any contractor or subcontractor not so licensed is subject to the penalties imposed by the Laws and Regulations.

Section 9.8 Drug-Free Project. Because of safety concerns related to the construction, operation and maintenance of the Network, Company (and S&W with respect to construction) shall to the extent permitted by Laws and Regulations develop a policy and implement and maintain a program to ensure that personnel involved in the construction, operation and maintenance of the Network do not use, in violation of applicable laws, any controlled substance as defined in Minn. Stat. Ch. 152 (1996). The drug-free program shall be implemented in accordance with applicable Laws and Regulations and shall include, to the extent permitted by applicable Laws and Regulations, testing of personnel involved in constructing, operating or maintaining the Network to determine their compliance with Company's (and, as to construction, S&W's) policy. For purposes of developing, implementing, and maintaining the program to ensure a drug-free project, Company and S&W shall not be deemed to be agents of the State or federal government.

ARTICLE X SCHEDULE OF PERFORMANCE

Section 10.1 Effect of Milestones.

(a) Company shall be obligated to pay liquidated damages as provided in Section 16.3(a) if and when Company and S&W fail to meet the deadline for commencing liquidated damages set forth in Exhibit F, as such deadline may be extended pursuant to this Agreement.

(b) The deadlines (other than liquidated damages deadline) set forth in Exhibit F provide to State a right to terminate this Agreement to the extent provided in Section 15.2(b).

Section 10.2 Make-up of Delays. Whenever there occurs a delay in meeting any date set forth in the Schedule of Performance set forth in Exhibit F, Company and S&W shall use best and diligent efforts to recover such lost time by expediting, to the extent practicable and commercially reasonable, performance of subsequent tasks, the ultimate intent being to restore the rate of performance to the specified milestones in the Schedule of Performance.

Section 10.3 Effect of Disputes on Schedule of Performance. The existence of any dispute and the pendency of any action or proceeding to resolve a dispute between State and either Company or S&W concerning any matter shall excuse continued and timely performance by the party seeking excuse for delay, as the case may be, of its obligations under this Agreement and entitle it to suspend or delay performance only to the extent that the party seeking excuse for delay bears the burden of showing that the same actually and directly interferes with its ability to proceed with performance of its obligations under this Agreement. Proper exercise by State of its rights in accordance with this Agreement to review, comment on, approve or disapprove matters, to attend meetings, to conduct inspections, to inspect and audit books and records and to require repair or replacement of defective or non-conforming work shall not in any manner excuse continued and timely performance by Company or S&W of its obligations under this Agreement or entitle Company or S&W to suspend or delay performance.

Section 10.4 Extension of Scheduled Performance.

(a) If Company or S&W is rendered wholly or partly unable to perform, or is delayed in performance of, its material obligations under this Agreement or to meet the milestone dates set forth in the Schedule of Performance because of an event or events of Force Majeure, Company's or S&W's time to perform any obligation hereunder and/or such milestone date, as applicable, shall be extended by a number of Days equal to the total number of Days Company or S&W, as the case may be, is actually impaired from performing its obligations under this Agreement or delayed in meeting any such milestone date, respectively, as a direct and proximate result of such event of Force Majeure, provided that:

(i) Force Majeure shall include, and Company or S&W, as the case may be, shall receive credit or extension of time on account of, events or delays only if Company or

S&W, as the case may be, delivers to State written notice describing in reasonable detail the event or delay, its cause, when and how Company or S&W, as the case may be, first obtained knowledge and the date it commenced;

(ii) if State receives such written notice more than five business Days after either Company or S&W first obtains knowledge of the event or delay, then the period of delay for which Company or S&W, as the case may be, otherwise would receive credit shall be reduced by the number of Days from and after such fifth business Day to and including the date State receives such written notice;

(iii) if the event of Force Majeure delays performance for a period in excess of 30 Days, the party delayed from performing shall on or before the first and fifteenth day of each calendar month thereafter notify the other party of its best estimate of the length of time the event of Force Majeure and the delay will remain in effect;

(iv) the suspension of performance shall be of no greater scope and of no longer duration than is actually and reasonably required by the event of Force Majeure;

(v) Company or S&W, as the case may be, shall use best efforts to remedy its inability to perform;

(vi) in no event shall the aggregate period of extension of the milestone for Commencement of Construction of Phase 1 extend such milestone date beyond June 1, 1999, provided that State in its sole discretion may extend such outside deadline; and

(vii) in no event shall the aggregate period of extension of any milestone for commencing liquidated damages exceed one year for events of Force Majeure other than circumstances described in subsections (c)(i), (ii), (iii) and (iv) below, nor shall the aggregate period of extension of any milestone for commencing liquidated damages exceed three years for events of Force Majeure including circumstances described in subsections (c)(i), (ii), (iii) and (iv) below.

(b) Where the event of Force Majeure affects permitting, design, construction or equipping of only a portion of the Network, Company and S&W shall, to the extent feasible, re-prioritize work on, and reassign workers, materials and equipment to, other portions of the Network.

(c) In the event of (i) any circumstance described in Section 2.53(b) (definition of Regulatory Approval Delay), (ii) any pending litigation challenging the validity of this Agreement or its procurement, (iii) any pending litigation or administrative proceeding concerning the validity of Section 11.1 or (iv) any decision in another case which sets firm precedent under similar facts and circumstances against the validity of Section 11.1, Company nevertheless shall continue normal efforts to further refine the architectural design and topology of the Network and the Equipment configurations for Phase 1, and to prepare conceptual drawing, Plans and Specifications for Phase 1. If any of the circumstances under item (i), (ii),

(iii) or (iv) above continues to exist after such work is complete, or if in the course of such work an adverse decision is rendered in any such litigation or administrative proceeding, then such circumstances, at Company's or S&W's election, shall constitute Force Majeure entitling Company and/or S&W to suspend further work pursuant to subsection (a) above (and notwithstanding subsection (a)(v) above).

Section 10.5 Schedule for TMC Fiber Optic Installations.

(a) The TMC operates ITS applications by use of fiber optic cable and other lines. MnDOT has scheduled build-out of fiber optic cable not yet installed in the eastern sectors of the seven county Minneapolis-St. Paul metropolitan area during 1997, 1999, 2002, 2003 and 2005. A copy of such schedule and maps and plans for such build-out are attached to this Agreement as Exhibit G. The schedule is subject to change from time to time. MnDOT shall promptly deliver to Company and S&W any modifications to such schedule made from time to time prior to the date S&W issues subcontractor bid requests for corresponding Construction Segments of Phase 1.

(b) If Company and S&W proceed with Commence of Construction of Phase 1, Company and S&W shall give highest priority to commencing and completing the portions of Phase 1 which correspond with the TMC segments in the eastern sector according to a schedule that permits MnDOT to avoid the cost and expense of constructing and installing its own fiber optic cable in the eastern sector, and in any event shall complete such work within the three year period set forth in the Schedule of Performance for designing and constructing Phase 1 of the Network, as the same may be extended pursuant to this Agreement. Company and S&W shall give the same priority to any fiber optic improvements for the eastern sector (in addition to that already included in Phase 1) which MnDOT requests in accordance with Section 3.3(e).

Section 10.6 Sequencing for Construction Segments. Prior to Commencement of Construction of Phase 1, Company, S&W and State shall confer in good faith to establish a sequencing schedule for all Phase 1 Construction Segments under which the Construction Segments shall be grouped into three groups corresponding with the 1998, 1999 and 2000 construction seasons. The sequencing schedule shall set forth all the routes described in Exhibit A and shall group Construction Segments logically in order to complete all Construction Segments for a given route in the same construction season. In determining the sequencing schedule, the parties shall evaluate and to the maximum extent practicable accommodate the needs and priorities of both the State and Company. The sequencing schedule shall be subject to State's written approval, which State shall not unreasonably withhold or delay.

ARTICLE XI
RELATIONSHIP WITH TRANSPORTATION FACILITIES
AND OTHER COMMUNICATIONS FACILITIES

Section 11.1 Other Fiber Optic Systems.

(a) State hereby agrees that it shall not grant a license, permit or other right to any other party to construct, install and operate a fiber optic communications system longitudinally within the Freeway Right of Way locations specifically identified on Table F of Exhibit A, including any portion of the Optional Phase 1 Routes for which Company validly exercises its option in accordance with Section 5.11(a). State and Company acknowledge that the foregoing covenant is consistent with and given pursuant to the State's authority under Section 253(c) of the Telecommunications Act of 1996 to continue to manage trunk highways to preserve and protect the health, safety and welfare of the traveling public and the State's authority which existed prior to the passage of the Telecommunications Act of 1996 as described in Section 1.7. State and Company also acknowledge that the foregoing covenant will assist Company in financing development of a Network which reaches rural areas of Minnesota.

(b) The right granted under subsection (a) above shall expire on the first to occur of (i) ten years after the last Acceptance Date for Phase 1 or (ii) termination of this Agreement for any reason.

(c) The right granted under in subsection (a) above is subject to the following exceptions and exclusions:

(i) any fiber optic communications systems and equipment in place within or adjacent to any Freeway Right of Way as of the Agreement Date, whether a perpendicular crossing or a longitudinal installation, and all modifications and upgrades to and replacements of such systems and equipment;

(ii) any fiber optic or other communications systems and equipment which is located within or adjacent to Freeway Right of Way, whether constructed and installed before or after the Agreement Date, and which is used solely as set forth in Section 3.4;

(iii) any wireless form of communications system, such as cellular, personal communications services, specialized mobile radio and direct satellite transmission, receiving, transmitting or power generation facilities, which is located within or adjacent to Freeway Right of Way, subject, however, to the provisions of Section 11.7;

(iv) any fiber optic cable crossing Freeway Right of Way at an angle approximately perpendicular to the direction of the Freeway Right of Way, and any grants of Permits for such purpose made at any time before or after the Agreement Date;

(v) any fiber optic cable and related equipment installed longitudinally within or adjacent to Freeway Right of Way pursuant to State's grant of a Permit or other right therefor after the Agreement Date, provided that:

(A) such installation is limited to a bridge span, underpass, overpass or tunnel; or

(B) MnDOT determines that such installation is necessary to avoid hardship or other special circumstances and the total length for such installation does not exceed (I) 1,500 feet at any one location or (II) 1,700 feet in the aggregate;

(vi) the facilities of Collocating Customers; and

(vii) all communications systems and equipment of every type and kind located within or adjacent to any Non-Freeway Highway or within or adjacent to any Freeway Right of Way not specifically identified on Table F of Exhibit A.

(d) The rights granted under subsection (a) above shall cease as to an Optional Phase 1 Route, and, subject to Section 5.11(b), State shall be free to explore other opportunities with any other party to deploy fiber in such Optional Phase 1 Route, whenever Company's right to include the same in Phase 1 expires pursuant to Section 5.11(a). If, however, Company and State later include an Optional Phase 1 Route in the Network pursuant to Section 5.11(b), then the rights granted under subsection (a) above shall thereupon apply to such Optional Phase 1 Route.

(e) If at any time during the period commencing ten years and expiring 20 years after the last Acceptance Date for Phase 1 State desires to offer the opportunity to place an additional fiber optic communication system within any Freeway Right of Way location specifically identified on Table F of Exhibit A and such fiber optic system is not one described in subsection (c) above, and if at such time there exists no Company Default, then State shall deliver to Company written notice setting forth such opportunity and the portions of such Freeway Right of Way on which State is then offering the opportunity, and Company shall have a first right of exclusive negotiation with the State for the design, permitting and installation of such fiber optic system. Such exclusive right of first negotiation shall expire as to the Right of Way locations encompassed in State's written notice if for any reason State and Company are unable or unwilling to enter into a binding, written agreement respecting such additional fiber optic system within 120 Days after State delivers its written notice to Company. During such 120-Day period State and Company shall engage in good faith negotiations, without obligation, however, to agree upon any particular terms or conditions. If and when such right expires without consummation of an agreement, State shall be free to use the Right of Way encompassed in State's written notice on its own, and/or to offer and grant access to such Right of Way to any other party on any terms, to design, permit, install, manage, operate and use fiber optic systems and equipment; provided that neither State nor any other party receiving an agreement from State shall interfere with Company's rights under this Agreement to use the Right of Way.

(f) While both State and Company believe this Section 11.1 is fully valid and enforceable, neither State nor Company warrants or represents the validity or enforceability of this Section 11.1 either on its face or as applied.

Section 11.2 Relocations.

(a) If (i) any portion of the Network must be relocated due to State's reconstruction, modification, change in grade, expansion or relocation of any State Trunk Highway, (ii) such project is identified in the State Transportation Improvement Program through the end of Fiscal Year 2000 published as of the Agreement Date (the "STIP"), and (iii) State commences any work on such project by the end of Fiscal Year 2000, then Company shall assume and pay all costs associated with such required relocation.

(b) If (i) any portion of the Network must be relocated due to State's reconstruction, modification, change in grade, expansion or relocation of any State Trunk Highway, (ii) such project is not identified in the STIP and (iii) State commences any work on such project by the end of Fiscal Year 2000, then State shall assume and pay all costs associated with such required relocation.

(c) If (i) any portion of the Network must be relocated due to State's reconstruction, modification, change in grade, expansion or relocation of any State Trunk Highway and (ii) State commences any work on such project after the end of Fiscal Year 2000, then Company shall assume and pay 80% as to Phase 1 and 90% as to Phase 2 and State shall assume and pay 20% as to Phase 1 and 10% as to Phase 2 of all costs associated with such required relocation.

(d) If any portion of the Network must be relocated due to State's reconstruction, modification, expansion or relocation of a MNet hub or a MnDOT regional office, or due to State's election to require relocation from building space in which Company has located Equipment pursuant to Section 5.2(c)(vii) then (i) Company shall assume and pay 80% as to Phase 1 and 90% as to Phase 2 and State shall assume and pay 20% as to Phase 1 and 10% as to Phase 2 of all costs associated with such required relocation of Network fiber and (ii) Company shall assume and pay all costs associated with such required relocation of Equipment at the site.

(e) When a relocation is required, State shall, in consultation with Company, designate a new route for the affected portion of the Network. Company shall implement the relocation in compliance with the Utility Accommodation Policy, applicable Permits, and the provisions of this Agreement relevant to construction. Company shall implement the relocation on a schedule which will not delay or interfere with MnDOT's construction schedule. To the maximum extent practicable, Company shall effect a cutover of operations from the original portion of the Network to the relocation portion without disruption in service. State shall have no liability for any disruption in service arising out of a required relocation.

(f) Whenever relocation of the Network is required, Company shall have the right, at its election, to relocate the affected portion of the Network to property not owned or controlled by MnDOT; but if Company makes such election, then (i) the costs chargeable to State for the

relocation shall not exceed what the State would incur upon relocation to the new route State designates under subsection (e) above and (ii) any rights under Section 11.1 which otherwise would apply to the affected portion of the Network shall cease.

(g) If State closes or abandons any Right of Way in which the Network is located, Company nonetheless may elect to keep the Network in place, but only if and for so long as the continued presence and operation of the Network in such closed or abandoned Right of Way will not interfere with subsequent uses thereof or with MnDOT's ability to fulfill any legal or contractual obligations MnDOT owes to others respecting such Right of Way. If and when relocation from such closed or abandoned Right of Way is required, allocation of the costs of relocation shall be governed by subsection (a), (b) or (c) above, whichever is applicable.

(h) To the extent State's actions requiring relocation of the Network constitute an event of Force Majeure, the provisions of Section 10.4 shall govern Company's and S&W's right to extension of time therefor.

(i) Whenever any portion of the Network must be relocated, Company also shall relocate or cause to be relocated the corresponding portion of any fiber optic cable and equipment of Collocating Customers. State shall have no liability for any costs associated with such required relocation of Collocating Customers.

Section 11.3 Relationship with Intelligent Transportation Systems. State is and shall remain the exclusive owner of all right, title and interest in and to, and Company and S&W disclaim and renounce any right, title or interest in or to, any and all ITS components, systems, equipment and applications (including but not limited to the TMC, the equipment at remote locations operated and monitored at the TMC and all fiber optic cable constructed and installed by MnDOT for the TMC), any and all software, software documentation, source code, source code documentation and modifications or enhancements thereto used or applied in the operation of ITS, and any and all data and information generated by ITS operations and applications. Company's and S&W's right of access to such data and information shall be the same as that of any member of the general public. The foregoing shall not disqualify Company or S&W from responding to and being considered under any request for bids, proposals or qualifications which MnDOT may issue in the future respecting Intelligent Transportation Systems. For the foregoing purposes, the physical point of demarcation between the Network and any Intelligent Transportation System shall be at each interconnecting Node.

Section 11.4 Non-interference with Rights of Way Operations, Maintenance and Improvement. MnDOT, at its expense except to the extent provided otherwise in Section 8.2(b), shall have the right at any time (and without liability to Company or S&W for any damages it may suffer, except as specifically provided in subsection (b) below) to modify existing transportation facilities, to construct new transportation facilities and to perform planned and emergency maintenance, renewal and replacement, safety and repair activities on existing and new transportation facilities regardless of the impact of such activities on the Network or its operations; provided, however, that:

(a) MnDOT shall confer with Company (and, during construction of Phase 1, S&W) as to activities to be performed in the ordinary course on such transportation facilities which might reasonably be expected to adversely impact construction, operation, maintenance or repair of the Network or to entail charges to Company under Section 8.2(b), and shall use reasonable efforts to coordinate such activities with Company and S&W in order to reduce or eliminate such adverse impact;

(b) to the extent the modification of existing transportation facilities or construction of new transportation facilities entails or requires relocation of the Network or any Equipment or the fiber optic cable and equipment of Collocating Customers, the provisions of Section 11.2(a) shall govern MnDOT's financial responsibility therefor;

(c) in the event emergency maintenance, repair or replacement is required for the Network, MnDOT shall use diligent efforts to delay, reschedule or relocate any non-emergency work of MnDOT on the related transportation facilities to accommodate such emergency work on the Network; and

(d) to the extent MnDOT's actions constitute an event of Force Majeure, the provisions of Article X shall govern Company's or S&W's right to extension of time therefor.

Section 11.5 Utility Crossings. In the course of construction and operation of the Network, Company and S&W shall not damage or interfere with any utilities crossing the Network, and shall locate the Network so as to minimize such damage or interference. This provision is not intended to confer upon any utility as a third-party beneficiary or otherwise any right or benefit to which it is not otherwise entitled by Laws and Regulations or contract, or to excuse any utility from its notification, marking, damage repair and other obligations under Ch. 216D, Minnesota Statutes.

Section 11.6 Access Over Non-State Properties The interconnection of certain MNet hubs or MnDOT regional offices to the Network may depend on Company's ability to obtain access to local streets, to rights of way or to other properties which are not State Trunk Highways in order to install fiber and related improvements. At Company's request and expense, State shall assist Company in applying for, negotiating and obtaining agreements and approvals for access over such streets, rights of way or other properties.

Section 11.7 Right of Negotiation for Wireless Facilities.

(a) Company shall have and is hereby granted a right of negotiation with the State for a modification to this Agreement providing to Company rights of access to Right of Way for Phase 1 for the purpose of designing, permitting, siting, installing, leasing, licensing, managing, operating and providing use to others of wireless communications facilities, including but not limited to cellular, personal communications services (so-called "PCS") facilities, specialized mobile radio (so-called "SMR") and microwave facilities. Such right of negotiation shall expire if for any reason State and Company are unable or unwilling to enter into a binding, written modification to this Agreement respecting such wireless facilities by April 30, 1998. State and

Company may, but are not required to, extend such deadline by mutual written agreement. During such period State shall, at Company's request, engage in good faith negotiations, without obligation, however, to agree upon any particular terms or conditions. If and when such right expires without consummation of a modification to this Agreement, State shall be free to use such Right of Way on its own, and/or to offer and grant access to such Right of Way to any other party on any terms, to design, permit, site, install, lease, license, manage, operate and use wireless facilities; provided that neither State nor any other party receiving an agreement from State shall interfere with Company's rights under this Agreement to use the Right of Way for construction, maintenance and operation of the Network. Such right of negotiation is non-exclusive; and State may during the negotiation period engage in discussions with others concerning any potential program, arrangement or procurement for wireless facilities in Right of Way, except that State shall not engage in negotiations with others concerning any master agreement or arrangement for installing wireless facilities system-wide on Freeway Right of Way. During the negotiation period, State shall not disclose to others the substance of its negotiations with Company, except to the extent required by court process or applicable Laws and Regulations.

ARTICLE XII FINANCING AND RESERVES

Section 12.1 Private Sector Financing.

(a) Company shall be solely responsible for obtaining, and shall use diligent efforts to procure, all financing, and for generating all revenue, necessary to design, permit, develop, procure, construct, install, operate, administer, maintain, repair and replace the Network.

(b) Except as expressly provided otherwise in this Agreement, State shall have no obligation whatsoever to pay any costs, including but not limited to payments on Project Debt, arising out of or relating to the design, permitting, development, procurement, construction, installation, operation, administration, maintenance, repair or replacement of the Network.

(c) Notwithstanding anything to the contrary contained in this Agreement, State shall not be obligated by this Agreement or otherwise to continue operation of the Network after the expiration or earlier termination of this Agreement.

Section 12.2 Reserve Accounts.

(a) Company shall establish with one or more institutions acceptable to State an auditable system for the deposit and disbursement of Total Revenues. Total Revenues shall be used and applied in part to fund, continuously maintain and replenish reserve accounts consisting of a Maintenance Fund and a Technology Upgrade Fund respecting Phase 1. Company shall have no obligation to establish any such reserve funds for Phase 2.

(b) The levels and method of funding, and arrangements for holding and disposing, of the Maintenance Fund and the Technology Upgrade Fund shall be proposed by Company and its primary Lender and shall be subject to the prior review and written approval of the State Project Manager. Such approval shall be based on industry standards. In any event:

(i) Company shall initially fund the Maintenance Fund and the Technology Upgrade Fund prior to or concurrently with the first Acceptance Date;

(ii) Company shall thereafter make deposits to the Maintenance Fund and the Technology Upgrade Fund in the order of priority and up to the respective amounts approved by State; and

(iii) the Maintenance Fund and Technology Upgrade Fund shall be established and held either with the primary Lender or with a trustee under a trust agreement. The identity of the trustee and any successor trustee under the trust agreement and the terms of the trust agreement shall be subject to the prior approval of State, which approval shall not be unreasonably withheld or delayed.

(c) Money and other instruments held in the Maintenance Fund may be used only for the following purposes:

(i) to pay Company's reasonable and actual costs of operating, administering, maintaining and repairing Phase 1 of the Network, to the extent such costs in any Fiscal Year exceed the budgeted amount thereof for such Fiscal Year (including budgeted contingency) set forth in a written budget approved by the primary Lender and submitted to State prior to the beginning of such Fiscal Year; and

(ii) to pay amounts owed to State under this Agreement, to the extent Company has insufficient funds from Total Revenues to pay such amounts when due.

(d) Money and other instruments held in the Technology Upgrade Fund may be used only for the following purposes:

(i) for any of the purposes described in subsection (c) above, for required debt service payments to Lenders and for funding required debt service reserve funds, provided that (A) in no event may funds be used to pay any principal portion of Project Debt which has become due by reason of acceleration of the due date thereof or by reason of a scheduled balloon payment and (B) in no event may funds be used for these purposes if funds are then available from the Maintenance Fund for these purposes; and

(ii) reconstruction, renewal and replacement of Phase 1 of the Network, and/or any technology upgrades to Phase 1 of the Network as described in Section 7.6(a).

(e) Upon the expiration or earlier termination of the Term, all the funds then remaining in the Maintenance Fund and Technology Upgrade Fund shall be used and distributed as follows:

(i) first, to Company to pay actual and reasonable costs Company incurs to remove Equipment and other portions of the Network in accordance with Sections 15.4(b) and (c), provided that Company shall first submit to State reasonable evidence of such costs, including but not limited to bills, invoices and receipts not later than 60 Days after the deadline for completing removal under Sections 15.4(b) and (c); and

(ii) second, the balance, if any, to State.

Section 12.3 Taxes. Company shall be solely responsible for the payment of, and shall pay prior to delinquency, all income taxes, corporate (or equivalent) franchise taxes, sales and use taxes and any other tax, fee, charge or levy, however denominated, based on the revenues, gross or net income or business of Company payable to any entity, including, without limitation, the federal government, State, local entities or districts.

ARTICLE XIII
RELIANCE , INDEMNITY AND INSURANCE

Section 13.1 Limitation on Company's Right to Rely.

(a) S&W and Company expressly acknowledge and agree that State's rights under this Agreement to review, comment on, inspect, approve, disapprove and/or accept architectural and other designs, Equipment configurations, plans, specifications, Key Contracts and the plan therefor, qualifications of contractors and sub-contractors, User Agreements, construction, Equipment, installations, Punch Lists, Acceptance Test Plan, Testing Requirements, Performance Standards, the O,A&M Plan, rate structures, operations, administration, maintenance and/or renewal and replacement activities, arrangements regarding reserve accounts, books, documents, records, reports or statements, and to monitor and sample work or activities:

(i) exist solely for the benefit and protection of State;

(ii) except for express contractual standards for approval or disapproval set forth elsewhere in this Agreement, do not create or impose upon State any standard or duty of care, contractual or non-contractual, toward any Company Party or S&W Party, all of which are hereby disclaimed; and

(iii) may not be relied upon, nor may State's exercise or failure to exercise any such rights be relied upon, by Company or S&W in determining whether Company or S&W has satisfied the standards and requirements set forth in this Agreement.

(b) Regardless of State's exercise or failure to exercise any such rights, and regardless of the issuance of Acceptances, Company and S&W, as the case may be, at all times shall have an independent duty and obligation to obtain all necessary Regulatory Approvals for, design, construct, install, equip, operate, administer, maintain, renew, replace and manage the Network in accordance with such standards and requirements.

(c) No rights of State described in subsection (a) above, no exercise or failure to exercise such rights, no failure of State to meet any particular standard of care in the exercise of such rights, and no Acceptances shall:

(i) relieve Company or S&W of its responsibility for the selection and the competent performance of all contractors, subcontractors, architects, engineers and other consultants;

(ii) relieve Company or S&W of its indemnification obligations under this Agreement;

(iii) relieve S&W of its obligations under the S&W Guaranty;

(iv) be deemed or construed to waive any of State's rights and remedies or any of the obligations of Company or S&W under this Agreement or Permits; or

(v) be deemed or construed as any kind of representation or warranty, express or implied, by State.

(d) Notwithstanding any contrary provision of this Section 13.1, (i) any State request or requirement to modify, alter, remove, replace, add to or change any work of improvement Company or S&W performs in accordance with Plans and Specifications approved or deemed approved by State pursuant to Section 5.4(c) shall be subject to State's obligation to pay for the same under Section 5.10 should such request or requirement constitute a State Major Change; and (ii) State shall have no right to impose Testing Requirements not contained in the Acceptance Test Plan established pursuant to Section 6.2.

Section 13.2 Indemnities From Company and S&W.

(a) The provisions of this Section 13.2 shall not apply to any matters encompassed in Section 13.6.

(b) Except as otherwise expressly provided in subsection (d) below, Company shall indemnify, protect, defend, hold harmless and release each State Indemnitee from and against any and all third party Claims arising out of and to the extent of the culpability of a Company Party or S&W Party. Such culpability shall include the following:

(i) any act or omission of any Company Party or S&W Party;

(ii) any errors, defects or deficiencies in the siting, architectural design and topology, Equipment configuration, plans, specifications, layout, construction, installation, materials, workmanship, suitability, fitness, maintenance or operation of or relating to the Network resulting from the errors, acts or omissions of any Company Party or S&W Party;

(iii) any damage to or disruption of utility installations in Right of Way caused by any construction, installation or other activities of any Company Party or S&W Party;

(iv) any unsafe or dangerous condition, latent or patent, of or affecting the Network or any construction, maintenance or staging area resulting from the errors, acts or omissions of any Company Party or S&W Party, excluding those conditions which comply with applicable State design and construction standards described in Sections 5.3(a) and (b);

(v) any failure or disruption of service by, from or through the Network to any user (other than State, whose remedies in such event are governed by Section 16.3) or customers of any user;

(vi) Claims against a State Indemnitee by a third party which arise out of the breach or falsity of any representation or warranty of Company under this Agreement;

(vii) any mechanic's, materialman's or design professional's lien on State's right, title and interest in and to any Right of Way or other property arising out of the actual or alleged furnishing of labor, materials or services to or for the Network or any portion thereof by or on behalf of or at the request of any Company Party or S&W Party;

(viii) use, incorporation into the Network or infringement of any actually or allegedly patented, copyrighted, trademarked, service-marked or other proprietary materials, equipment, devices or processes, including Intellectual Property; and

(ix) any misuse or abuse of the Network or the services available thereon by Company or any operator or user thereof (other than State), including but not limited to libelous, slanderous, illicit or illegal communication through, and illegal monitoring or interception of communications on, any part of the Network.

(c) Except as otherwise expressly provided in subsection (d) or (e) below, S&W shall protect, defend, hold harmless and release each State Indemnitee from and against any and all third party Claims arising out of and to the extent of the culpability of an S&W Party. Such culpability shall include the following:

(i) any act or omission of any S&W Party;

(ii) any errors, defects or deficiencies in the siting, architectural design and topology, Equipment configuration, plans, specifications, layout, construction, installation, materials, workmanship, suitability or fitness of or relating to the Network resulting from the errors, acts or omissions of any S&W Party;

(iii) any damage to or disruption of utility installations in Right of Way caused by any construction, installation or other activities of any S&W Party;

(iv) any unsafe or dangerous condition, latent or patent, of or affecting the Network or any construction, maintenance or staging area resulting from the errors, acts or omissions of any S&W Party, excluding those conditions which comply with applicable State design and construction standards described in Sections 5.3(a) and (b);

(v) Claims against a State Indemnitee by a third party which arise out of the breach or falsity of any representation or warranty of S&W under this Agreement;

(vi) any mechanic's, materialman's or design professional's lien on State's right, title and interest in and to any Right of Way or other property arising out of the actual or alleged furnishing of labor, materials or services to or for the Network or any portion thereof by or on behalf of or at the request of any S&W Party; and

(vii) use, incorporation into the Network or infringement by any S&W Party of any actually or allegedly patented, copyrighted, trademarked, service-marked or other proprietary materials, equipment, devices or processes, including Intellectual Property.

(d) Company's and S&W's respective indemnities exclude the portion of liability on a Claim that is attributable (i) to the culpability of a State Indemnitee or a third party or (ii) to a deficiency in a State design or construction standard which either (A) is, as to Company, unknown to Company and S&W, and as to S&W, unknown to S&W or (B) although known to Company or S&W, is communicated in writing to State and not waived by State. If the culpability of a State Indemnitee or a third party or such deficiency in a State design or construction standard has contributed to a loss, Company and S&W shall not be obligated to indemnify State Indemnitees for the proportionate share of such Claim caused thereby. In addition, S&W's indemnity excludes the portion of liability on a Claim that is attributable to a Company Party. If a Company Party has contributed to a loss, S&W shall not be obligated to indemnify State Indemnitees for the proportionate share of such Claim caused thereby. Notwithstanding the foregoing, in no event shall State be liable for third party Claims for consequential, incidental, special, indirect or exemplary damages allegedly resulting from failure or disruption in service by, from or through the Network.

(e) Except for liability respecting death, bodily injury or property damage to third parties, S&W's liability under this Section 13.2 is limited to Claims made or asserted within the first to occur of (i) the expiration of any applicable statute of limitations or statute of repose or (ii) 12 years after the last Acceptance Date for Phase 1 of the Network. S&W's liability under this Section 13.2 respecting death, bodily injury or property damage to third parties in any event is subject to any and all statutes of limitations and statutes of repose; and such liability shall not extend that period of time which under law would apply in the absence of any express indemnification. Nothing in this Section 13.2 shall expressly or impliedly extend the period of the S&W Guaranty set forth in Section 5.8(e). Nothing herein constitutes an assumption or indemnification by State respecting any third party Claim made or asserted against S&W beyond the applicable time period described above.

(f) For purposes of this Section 13.2, a "third party" means any person or entity other than a Company Party, S&W Party or State Indemnitee, except that a third party includes any State employee, agent and contractor who asserts a Claim against State which is within the scope of the indemnities set forth in this Section 13.2 and which is not covered by State's worker's compensation program.

Section 13.3 State Waiver of Contribution.

(a) The provisions of this Section 13.3 shall not apply to any matters encompassed in Section 13.6.

(b) Except as otherwise expressly provided in subsection (c) below and Section 13.1, State hereby waives Claims for contribution or indemnification against Company and S&W with respect to any and all Claims arising out of and to the extent of the culpability of the State. Such culpability shall include the following:

(i) the negligence, fraud or willful misconduct of State, its agents, commissioners, members, appointed officials, officers, employees or representatives, related to State's use of the Network;

(ii) any State design or construction standard set forth in Exhibit B or any Permit which is a proximate cause of injury to or loss of life of any person, or damage to any property, provided that:

(A) Company, S&W and their contractors and consultants fully complied with such standard and (without any duty of independent investigation) did not know of its deficiency or, if they knew of a deficiency in a standard, unsuccessfully sought State's waiver of or approval of a deviation from such standard; and

(B) State's liability hereunder shall be limited to the amount of Claims payable to third parties;

(iv) the liability of Company, S&W or any of their respective directors, officers, employees, agents or representatives to a third party which arises out of the breach or falsity of any representation or warranty of State under this Agreement; and

(v) any use of work product or Intellectual Property by State or its agents in connection with (A) any system or location other than the Network or (B) the Network by a different method than intended.

(c) State's agreement to waive Claims for contribution and indemnification excludes the portion of liability on a Claim that is attributable to the culpability of a Company Party or S&W Party. If the culpability of a Company Party or S&W Party has contributed to a loss, State shall have the right to contribution and indemnification for the proportionate share of such Claims caused thereby.

(d) For purposes of this Section 13.3, "third party" has the same meaning as set forth in Section 13.2(f).

Section 13.4 Defense and Indemnification Procedures.

(a) The parties recognize and acknowledge that State lacks authority to, and therefore has undertaken no obligation to, directly provide or to cause the State Attorney General to provide Company or S&W with defense against Claims for which State waives contribution and indemnification under Section 13.3. State agrees, however, to request the State Attorney General to provide such a defense and to do so in accordance with the procedures set forth in this Section 13.4; provided that the State Attorney General will have sole discretion whether and, if so, under what procedure to provide such defense. If the State Attorney General agrees to provide a defense in accordance with the procedures set forth in this Section, then it shall be construed as if it were written as a bilateral, rather than unilateral, provision. In any case,

however, State shall be solely responsible for defending claims against it which are not within Company's and S&W's obligation to indemnify and defend under this Article XIII.

(b) The use of the words "indemnifying party" in this Section means either or both of Company and S&W, depending on whether one or both of them has an obligation to indemnify under Section 13.2.

(c) If any of the parties receives notice of a Claim or otherwise has actual knowledge of a Claim, it shall by writing as soon as practicable tender the Claim to the insurers under all potentially applicable insurance policies. If State seeks indemnification under this Article XIII respecting such Claim it also shall by writing as soon as practicable (i) inform the indemnifying party of such Claim, (ii) send to the indemnifying party a copy of all written materials it has received asserting such Claim and (iii) notify the indemnifying party that should no insurer accept defense of the Claim either (A) the defense of such Claim is being tendered to the party or (B) State has elected to conduct its own defense for a reason set forth in subsection (g) below.

(d) If the insurer under any applicable insurance policy accepts the tender of defense, Company, S&W and State shall cooperate in the defense as required by the insurance policy. If no defense is provided by insurers under potentially applicable insurance policies, then subsections (e), (f), (g), (h), (i), (j), and (k) below shall apply.

(e) If the State tenders a defense to the indemnifying party, the indemnifying party shall within 45 Days of said tender deliver to State a written notice stating that the indemnifying party (i) accepts the tender of defense and confirms that the Claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter, (ii) accepts the tender of defense but with a "reservation of rights" in whole or in part or (iii) rejects the tender of defense if it reasonably determines it is not required to indemnify against the Claim under this Article XIII. If such notice is not delivered within such 45 Days, the tender of defense shall be deemed rejected.

(f) If State tenders defense to the indemnifying party and the indemnifying party gives notice under subsection (e)(i) above, then except as provided otherwise in subsection (g) below, the indemnifying party shall have the right to control the defense of such Claim and shall bear the fees and costs of defending and settling such Claim; provided that any admission, settlement or compromise respecting the State shall require the State's prior written consent, which shall not be unreasonably withheld or delayed, or, if such consent is not given, the approval of the court. During such defense:

(i) the indemnifying party shall fully and regularly inform State of the progress of the defense and of any settlement discussions; and

(ii) State shall fully cooperate in said defense, provide to the indemnifying party all materials and access to personnel it reasonably requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to State,

and maintain the confidentiality of all communications between it and the indemnifying party concerning such defense.

(g) State shall be entitled to select its own legal counsel and otherwise control the defense of such Claim if:

(i) the State Attorney General's office, in its sole discretion, elects to control the State's defense; or

(ii) the defense is tendered to the indemnifying party and it refuses the tender of defense, or fails to accept such tender within 45 Days, or reserves any right to deny or disclaim such full indemnification thereafter; or

(iii) State, at the time it gives notice of the Claim or at any time thereafter, reasonably determines that:

(A) a conflict exists between it and the indemnifying party which prevents or potentially prevents the indemnifying party from presenting a full and effective defense;

(B) the indemnifying party is otherwise not providing an effective defense in connection with the Claim; or

(C) the indemnifying party lacks the financial capacity to satisfy potential liability or to provide an effective defense.

(h) State may assume its own defense pursuant to subsection (g)(iii) above by delivering to the indemnifying party written notice of such election and the reasons therefor. A refusal of, or failure to accept, a tender of defense may be treated by State as a Claim against Company or S&W subject to resolution pursuant to Section 16.7.

(i) If the State Attorney General's office elects to conduct the State's defense under subsection (g)(i) above, then the State shall bear all costs of the State's defense. If State is entitled and elects to conduct its own defense pursuant to subsection (g)(ii) or (iii) above, all reasonable costs and expenses it incurs in investigating and defending a Claim for which it is entitled to indemnification hereunder shall be reimbursed by the indemnifying party on a current basis. In the event State is entitled to and elects to conduct its own defense under subsection (g)(i), (ii) or (iii) above, then it shall have the right to settle or compromise the Claim with the indemnifying party's prior written consent, which shall not be unreasonably withheld or delayed, or, if such consent is not given, with approval of the court, and with the full benefit of the indemnifying party's indemnity.

(j) The parties acknowledge that while Sections 13.2 and 13.3 contemplate that each party will have responsibility for certain Claims arising out of their respective responsibilities hereunder and circumstances may arise in which there may be shared liability of the parties with